No. 12245.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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POINT I.

Count One of the Indictment Does Not State a Public Offense.

Appellee, on page 6 of his brief, attempts to state that the guilty scienter need not be charged as an essential element of the offense, due to the closing phraseology of the second division of the Statute, namely, "contrary to law." It is claimed that "fraudulently or knowingly" if alleged would have been redundant, and that "contrary to law, sufficiently charges guilty scienter."

The framework of many Statutes having subdivisions begins with the words: "any person who shall fraudu-

lently or knowingly" do certain things set out *in seriatum* and it is of course not required to repeat the expression "fraudulently or knowingly" when defining each act contained in the Statute. It would, however, be required of the pleader to allege such scienter if the prosecution was based upon a violation of one of the enumerated subsections of the Statute. This is the case at hand.

As pointed out, the trial court in a measure agreed with appellant at the time the matter was under consideration, as follows:

> "I think, if I were drawing the indictment, however, I would have put in 'did knowingly, unlawfully, willfully, feloniously, illegally' and so on and so forth 'received,' but it isn't there." [T. R. p. 48.]

We have cited the Supreme Court as directly bearing on this point, and again cite the language used:

> "Where guilty knowledge is a substantive ingredient of the offense it must be alleged." (*United States v. Buzzo,* 85 U. S. 18, 21 L. Ed. 812.)

and again,

> "The rule that all parts of an indictment should be taken into consideration, and that indictment should be reasonably construed, does not warrant court in supplying needed language which is essential to a necessary element of the offense." (*Mitchell v. U. S.,* 118 F. 2d 653.)

POINT II.

There Was Double Jeopardy.

In Point II of appellee's brief the request of appellant for release in the premises is argued at length that the action of the trial court amounted to nothing more than a withdrawal of said count from the consideration of the jury and that there is no jeopardy attached.

Appellant does claim, and again asserts that since the trial court elected to direct acquittals of the offending counts instead of merely withdrawing them from a consideration by the jury, it was an acquittal of the counts in every legal sense of the word. To acquit one of an offense is greatly different from merely withholding the same from a consideration by the jury.

Appellant in his brief stressed the fact that the granting of the acquittals was not a request but "an objection to the introduction of other evidence, and also a motion for dismissal on the ground that the indictment does not state a public offense." [T. R. p. 20.]

It is seen from the incident as the same occurred at the trial that the acquittance herein resulted from the action of the trial court who, as pointed out in appellant's brief, could have acted in any one of three ways, but chose to grant appellant an acquittal, and as we have stated, the same concert of action in relation to every essential fact upon which this appellant stands convicted was contained as necessary elements in Counts II and III.

If jeopardy attaches in this instance, regardless of the fact that the charges were made or tried together, or at different times, appellant respectfully urges that his conviction be reversed, and for reasons stated in his briefs may be discharged in the premises.

Respectfully submitted,

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Milton Theodore Shafer.